

AN ACCOUNT OF THE MAKING OF THE HUMAN RIGHTS AMENDMENT ACT 2001

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1. INTRODUCTION

In this paper I want to address the relationship between policy and law through a discussion of the 2001 Amendment to the New Zealand Human Rights Act 1993. Discussions of justice often focus on analysis of court decisions or legislation. Legal policy is not often analysed or the process by which legal policy is formed and incorporated into the law. This paper is an attempt to try and fill that gap through a description of the process to enact the 2001 Human Rights Amendment Act. The narrative is based on my experience so it is acknowledged at the outset that others involved in the process may hold different views.

I shall argue that the way in which human rights have been incorporated into New Zealand's legal system reflects the underlying constitutional relationship between the Parliament and the courts. This constitutional relationship is still founded on the notion of parliamentary sovereignty and while the courts are developing a role as the guardians of individual human rights, Parliament still retains the right to 'make the law'. New Zealand's lack of a written constitution and its flexible pragmatic approach to constitutional matters has meant that an iterative approach between the courts and Parliament has been evolving over the past 20 years. While both institutions have acknowledged the importance of adherence to human rights standards, their role in the application and enforcement of those standards has developed within the context of New Zealand's constitutional arrangements.

The reason I concentrate on the significance of 2001 Amendment in this lecture is because it demonstrates the role of Parliament in enacting a human rights statutory framework and also the role of the legal institutions that enforce human rights. It also clarifies the relationship between the Human Rights Act and the New Zealand Bill of Rights Act 1990 (NZBORA) in terms of the status of both Acts and the remedies available.

At the outset it is argued that New Zealand has a commitment to embedding human rights within its constitutional arrangements. New Zealand also may be described as a good international citizen because since the formation of the United Nations it has supported its various human rights initiatives. It has ratified the main human rights international treaties. It was not until the 1970s however that New Zealand started to incorporate its international commitments into domestic legislation. The role of human rights in New Zealand constitutional arrangements reflects its history and culture, including the long accepted commitment to parliamentary sovereignty as a fundamental tenet of those arrangements. This adherence to parliamentary sovereignty has been challenged recently, however, by the inclusion of human rights standards within the constitutional arrangements. This challenge has come through the enactment of a human rights statutory framework and

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the interpretation of that framework by the courts. This development has raised directly the issue of whether the courts can declare invalid or void legislation that does not conform to the human rights standards.¹

The debate as to who makes the law is an important but large topic, so this paper will focus on the significance of the 2001 Amendment's contribution to that debate.² To understand the role of the 2001 Amendment in seeking to clarify the relationship between Parliament and the courts in the enforcement of human rights, it is necessary to briefly review the statutory context within which human rights have developed in New Zealand.

The first domestic recognition of international human rights commitments in New Zealand came with the Race Relations Act 1971, the Long Title of which recited: "An Act to affirm and promote racial equality in New Zealand and to implement the International Convention on the Elimination of All Forms of Racial Discrimination."

This was followed by the Human Rights Commission Act 1977, the Long Title of which read: "An Act to establish a Human Rights Commission and to promote the advancement of human rights in New Zealand in general in accordance with the United Nations International Covenants on Human Rights."

The Human Rights Commission Act then was primarily the fulfilment of the government's international obligations to protect citizens from discrimination perpetrated by fellow citizens. It was written with the private sector in mind and sought to regulate the public sector only when it was acting as an ordinary person. It therefore applied to the government when acting as a private person, for example, as an employer, a landlord or supplier of goods and services that were analogous to those supplied by a private person.

The Human Rights Commission Act then was designed as anti-discrimination legislation. Originally it prohibited only discrimination on the grounds of sex, marital status, religious and ethical belief and contained grounds for the justification of discriminatory treatment in right and proper circumstances. It was not a Bill of Rights Act nor intended to be such an Act. The provisions of the Act in 1977 reflected the political pressure for the legislation. The women's movement had campaigned for legal protection and a remedy against discrimination since the 1975 Select Committee Report on the Role of Women in New Zealand Society, in their recommendation that:³

The committee recommends that legislation be introduced to prohibit discrimination against any person by reason of sex and however arising such legislation to provide the means for (a) eliminating sex discrimination and removing existing legal disability, (b) prescribing sanctions against discriminatory practices, and (c) establishing machinery for enforcement procedures, to function also as a means of informing and educating the public as to the implications of the principle of equality as embodied in the Act

The political rhetoric of the time was framed in terms of women's right to equality, and the connection between human rights and women's rights was tenuous. At the time of lobbying for legal

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- 1 See Petra Butler, "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUWLR 341 for an analysis of the relationship between the courts and the Parliament.
 - 2 Robin Cooke "Fundamentals" [1988] NZLJ 158 at 164; John Smillie "'Fundamental Rights', Parliamentary Supremacy and the New Zealand Court of Appeal" (1995) 111 LQR 209; Tom Campbell "Judicial Activism: Justice or Treason?" (2003) 10 Otago LR 307 at 312; Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Around" (2003) 14 PLR 148.
 - 3 Select Committee on Women's Rights *The Role of Women in New Zealand Society* (Government Printer, Wellington, June 1975) at 98. (Also AJHR I13).

recognition of the right not to be discriminated against, we did not express this claim in terms of human rights. This did not occur until the 1990s, and in particular the Beijing UN Women's Convention when in popular terms women's rights morphed into human rights.⁴ The conceptual framework for legal reform was firmly positioned within the demand for equality. A change of government in New Zealand in 1975, however, saw an end to a commitment to sex discrimination legislation and the advent of a Human Rights Commission Act.⁵

The change not only reflected the change in political ideology, but the advocacy of an influential lobby in the legal and public service community for recognition of the international human rights commitments in domestic legislation. At that time women were not influential in policy making, with few women in Parliament or senior roles in the public service. The result was a political compromise, with the title of the Act appearing to refer to human rights, while in reality it was a legal framework for recognition of a remedy for unlawful discrimination. It is a truism to state that the shape of legislation reflects the political environment of the time but it is still useful to be reminded of this fact when seeking to understand the purpose of legislation.⁶

The compromised nature of the Human Rights Commission Act meant it was unable to fulfil the expectations of all of its supporters. It was neither an aspirational statement of commitment to high principle nor an effective remedy against discrimination. It was also not designed to address the changing nature of the relationship between the individual and the state that accompanied the introduction of the neo-liberal economic policy framework in the 1980s. This led to campaigns amongst concerned citizens for a statement of principle of the rights of individuals that must be respected by the state.⁷ The result of these campaigns was the New Zealand Bill of Rights Act (NZBORA) in 1990, and more comprehensive anti-discrimination legislation in the 1993 Human Rights Act. Note the name change which signalled that the emphasis was now on human rights themselves, not the human rights institutional framework.

The campaign for a Bill of Rights gained traction when Ministers within the fourth Labour government supported the enactment of a Bill of Rights. The policy process began with a White Paper in 1985 recommending a Bill of Rights incorporating civil and political rights and the entrenchment of the legislation.⁸ In other words the Bill of Rights was to be superior legislation. The Bill provoked a discussion on the scope of the Bill and whether it should also include social and economic rights and the Treaty of Waitangi.⁹ The affects of the neo-liberal economic policies were starting to be felt at the time and citizens were seeking protection from the exercise of executive power that fundamentally changed their economic and social interests. The Bill of Rights was seen as a way to hold governments responsible for their economic and social policies as well as protecting civil and political rights of citizens. Perhaps not surprisingly there was little govern-

4 *Beijing Declaration and Platform for Action*, 4th World Conference on Women 15 September 1995 <www.un.org/womenwatch/daw/beijing>.

5 As part of the women's lobby for a specifically sex discrimination Act similar to that in Australia, the Human Rights Commission Act was seen by some of us as a compromise because it departed from the notion of specific sex discrimination legislation and incorporated the notion of sex discrimination with other forms of discrimination.

6 I was actively involved in the movement for the statutory recognition of the equality of women and in particular organising women and the law workshops at the various United Women's Forums that took place in the 1970s.

7 Sir Geoffrey Palmer provided parliamentary leadership for a New Zealand Bill of Rights.

8 *A Bill of Rights for New Zealand: A White Paper* [1985] AJHR A6 57 (White Paper).

9 For discussion of the various public concerns about the Bill see *Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* [1987-1990] AJHR I 8C.

ment political support for an extension to such rights so the focus returned to civil and political rights.

On the question of inclusion of the Treaty of Waitangi in the Bill of Rights, Māori during the consultation process made it clear they did not support inclusion, so it was dropped. The arguments were many but included a loss of mana (status) for the Treaty if it was included in legislation, especially if the Act was not entrenched, and the fear that incorporation risked the Treaty being amended or even repealed by Parliament. The Treaty of Waitangi as such has no legal status but is enforced through reference to the rights and obligations under the Treaty being incorporated in numerous Acts and Regulations.¹⁰ The pragmatic flexible nature of New Zealand's constitutional arrangements has meant that in reality the Treaty is recognised as a constitutional document and while its legal status may be in doubt, its political status is not.

The arguments surrounding the Bill then centred on whether the Bill should be entrenched legislation, with the implication that the courts could declare legislation unlawful. In other words, this was an attempt at constitutional change, the nature of which was seen by some as an attack on parliamentary sovereignty. Although New Zealand has a judiciary of high competence and integrity, there was little support for the courts over-ruling a decision of the Parliament. This is a fundamental, if contested, issue in what passes for a constitutional debate in New Zealand. It was to rise again in the 2001 review of the Human Rights Act, in the establishment of the Supreme Court and continues today.

The NZBORA then reflected the New Zealand approach to constitutional matters. The Long Title of the Act reads as follows:

An Act—

- (a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and
- (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

2. Rights Affirmed

The rights and freedoms contained in this Bill are affirmed.

3. Application

This Bill of Rights applies only to acts done—

- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4. Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

Decline to apply any provision of this enactment—

By reason only that the provision is inconsistent with any provision of this Bill of Rights.

¹⁰ Margaret Wilson "The Reconfiguration of New Zealand's Constitutional Institutions: The Transformation of Tino Rangatiratanga into Political Reality?" (1997) 5 Wai L Rev 17.

The Act specifically incorporates the International Covenant on Civil and Political Rights but preserves the notion of parliamentary sovereignty. Paul Rishworth notes:¹¹

... Parliament enacted the New Zealand Bill of Rights Act 1990, a non-entrenched statutory bill of rights designed to affect the interpretation of statutes but not their validity. The proponents of the Bill of Rights plainly intended its non-entrenchment to have the desired effect of keeping political power from judges but, to make sure, they added s 4 as well. That section makes it clear that legislation inconsistent with the Bill of Rights is not to be declared implicitly repealed or in any way held ineffective.

Although the Act is clear that the courts cannot declare a provision illegal or invalid, the courts, by developing the notion of declarations of inconsistency through their interpretation of the Act, may ensure human rights standards are not ignored.¹² I shall return to this issue later. The initial cases to the courts involved procedural correctness in criminal cases. Although the cases raised important issues, they did not fulfil the public's expectation that a Bill of Rights would provide a remedy for non-criminal matters. This expectation was unrealistic given the scope and nature of the NZBORA. It also highlighted the confusion between the Bill of Rights and Human Rights legal regimes. While s 19 of the NZBORA provided a right to be free from discrimination, that discrimination is limited to the grounds enumerated in the Human Rights Act 1993. The 1993 Human Rights Act extended the grounds for unlawful discrimination complaints and, importantly, led to an amendment to the NZBORA that extended the protection of freedom from discrimination to include all the prohibited grounds.¹³ While this amendment gave more substance to the NZBORA s 19 (freedom from discrimination) provision, it did not necessarily provide an effective remedy for citizens seeking a redress from unlawful discrimination.

In this paper I shall now concentrate on the policy attempts to provide an accessible effective remedy against unlawful discrimination. The extension of the prohibited grounds was important but equally important was the carrying over from the 1977 Human Rights Commission Act of s 151 that made it clear that the Human Rights Act should not limit or affect the provisions of any other Act or Regulation. This provision was similar to a provision in the NZBORA. Section 151 would have attracted little attention but for the fact that, during the submissions before the Select Committee on the 1993 Act, the Human Rights Commission argued it was not necessary to continue the provision because all legislation was to be made human rights compliant after the completion of a project to review all legislation for this purpose.¹⁴

This project was named Consistency 2000 and was to be led by the Human Rights Commission. The proposed project was an attempt to make all legislation human rights compliant through amending all legislation that was inconsistent with human rights obligations. It was a worthy, if ambitious, proposal to which the Select Committee expressed a cautious approach, as there was a concern that such a proposal was, again, constitutional change by stealth. In other words there was a concern that parliamentary sovereignty would be compromised by such an amendment to

11 Grant Huscroft and Paul Rishworth *Rights and Freedoms: The New Zealand Bill of Rights 1990 and The Human Rights Act 1993* (Brookers, Wellington, 1995).

12 *Baigent's Case* (1994) 1 HRNZ 42; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; *R v Poumako* [2000] 2 NZLR 695 at 719; (2000) 5 HRNZ 652 at 683 (CA); *R v Pora* (2000) 6 HRNZ 129. See also Petra and Andrew Butler's paper "16 Years of the New Zealand Bill of Rights" <www.alla.asn.au/conference>.

13 See Paul Rishworth, Grant Huscroft, Scott Optican, Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press Australia, 2003) at 368–375.

14 An account of the circumstances surrounding the s 151 issue is found in *Re-Evaluation of the Human Rights Protections*, Report for the Associate Minister of Justice and Attorney-General (Ministry of Justice, Wellington, 2000) at 25–52.

the new Human Rights Act. The Committee agreed, however, that once the project was completed s 151 should expire. The date set for expiry was 31 December 1999. The failure of the Human Rights Commission and the Government Departments to complete this task resulted in the expiry date for s 151 having to be extended to 31 December 2001.¹⁵ The amendment Bill to achieve this extension was accompanied by vigorous parliamentary debate that ignited the whole question of whether the expiry of the provision meant that the Human Rights Act was to become superior law and attain primacy over other legislation. This question was not resolved by the amendment because a Parliamentary majority for the Bill could only be achieved on the issue of extension of time. The stage was therefore set for this issue being debated again before the 31 December 2001 statutory expiry date.

The election of a Labour-led government at the end of 1999, with a manifesto commitment to review the whole human rights statutory framework, provided the stage for what turned out to be a highly acrimonious debate. It not only raised the whole question of who makes the law – the courts or parliament – but whether human rights were just another example of political correctness and social engineering, and if they were necessary at all. Although the incoming Labour Government had a commitment to review the legislation and institutions, the policy to review the Human Rights Act was driven by the need to enact new legislation before 31 December 2001. The two urgent policy issues on which the government sought advice were the completion of the review work of Consistency 2000, and the resolution of whether or not to repeal s 151. The more substantive question of a review of the whole Act was therefore influenced by this timetable.¹⁶

The two streams of policy work were commenced quickly. The first was to complete the Consistency 2000 review of all legislation to ensure it was human rights compliant. The project had been too ambitious and produced much information without a systematic method of identifying priority areas of real discrimination as opposed to potential discrimination. It was an example of a poorly designed policy project. The lack of case law also made the task of the Commission and officials very difficult. Although it may be argued that the project was ill-conceived it did produce some valuable information and identified areas for further consideration; for example, the position of same-sex couples, questions of family status, disability issues and questions of age responsibility. Useful guidelines for officials were subsequently produced by the Ministry of Justice to guide policy making to ensure it was human rights compliant, but the exercise highlighted the need to review the whole institutional human rights framework.

The second policy work stream began on 3 May 2000 with the – Government's establishment of a Ministerial Re-Evaluation of the Human Rights Protections in New Zealand. Four independent members¹⁷ were appointed to report on the best way in which the Government could fulfil its policy of implementation of human rights. The Government envisaged a more proactive active advocacy role for the human rights institutions. In essence, the objective was to mainstream human rights through creating a human rights culture in the international, public and private sectors. It

15 See Peter Cooper, Paul Hunt, Janet McLean and Bill Mansfield *Re-Evaluation of the Human Rights Protection Report*, August 2000. Report to Associate Minister of Justice, for a summary of the events during this period.

16 As the Minister responsible for the legislation, I was conscious that there was not the time nor the resources to undertake a major review within a three year term of Parliament but there was an opportunity to make some changes, because of the expiry of s 151 and the need to pass legislation to address that issue.

17 Peter Cooper, Paul Hunt, Janet McLean and Bill Mansfield were appointed as the Ministerial advisors who, with assistance from Ministry of Justice officials, wrote the *Re-Evaluation of the Human Rights Protection Report*, August 2000.

was a move away from the individual complaints focus that had dominated the work of the Commission, while also preserving the right of individuals to access the complaints process.

The reason for appointing a group of independent advisors was because a fresh, innovative perspective was required and the advice was needed urgently. In some ways it was an impossible task given the constraint of time. The tyranny of three year parliaments is a real issue when developing policy that will endure beyond the three years. The fact that the group produced a report that, in most respects, was adopted by the Government and has endured three subsequent changes of government is a tribute to the quality of the advice produced in a short time.¹⁸

The Ministerial Group report made several recommendations on institutional and administrative changes to the Human Rights Act. The most important advice included the recommendation that s 151(1) should be allowed to expire on 31 December 2001 because there was no possibility that the Human Rights Act would have primacy over other legislation. If such a situation was ever to occur in New Zealand, it argued that the NZBORA was the appropriate legislation to have primacy. In this context the report recommended that, when a person is acting under statutory authority or the prerogative, the actions should be assessed against the NZBORA standard. I shall return to the effect of this recommendation when I review the legal remedies now available for breach of the Human Rights Act.

The Ministerial Group also recommended a fundamental change in the focus of human rights institutions and an institutional redesign of those institutions. In summary, a new Human Rights Commission was recommended with a membership designed to be representative and to have a clear focus on being the advocate for human rights, so that human rights practice became mainstreamed into public and private sector decision making. The primary functions of the new Commission set out in the Amendment Act are as follows:

5 Functions and powers of Commission

(1) The primary functions of the Commission are—

- (a) to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society; and
- to encourage the maintenance and development of harmonious relations between individuals among the diverse groups in New Zealand society.

The first function was designed to promote a human rights culture and to engage the community in support of the concept and practice of human rights. It was intended to free the Commission from the complaints resolution focus that had dominated much of its good work in the past. The second function was recognition of the changing nature of race relations in New Zealand. Whereas the focus in the past had been on relationship between Māori and Pākehā, New Zealand society was becoming increasingly diverse and it was important to acknowledge the inclusion of other ethnicities. It was also a recognition that the focus of the relationship between Māori and Pākehā had shifted from individual rights to the Treaty of Waitangi and the question of Māori sovereignty.

The Treaty, in Article Three, guaranteed Māori equal rights and this commitment must be fulfilled, but the focus was now on collective rights with political and economic sovereignty assuming a greater prominence. The debate over the relationship between the Treaty of Waitangi and human rights is an important one, however, and will continue to be part of New Zealand con-

18 The Human Rights Amendment Act 2001 reflects the fact that the main recommendations of the Ministerial Group were accepted and implemented.

stitutional discourse.¹⁹ The recommendation to merge the Race Relations Office with the Human Rights Commission was controversial at the time. The government considered it necessary, however, to ensure that the institutional arrangements reflected a holistic approach to human rights and that there was a better balance between the twin functions of advocacy and complaint resolution.

Although the advocacy role of the Commission was given primacy, the other crucial role for the Commission had been the settlement of individual complaints. The Re-evaluation Report acknowledged the importance of both functions while recognising the tension that often exists between achieving both roles. Internationally, more attention had been given to the importance of institutional design in the effectiveness of the implementation of human rights. For example, the International Council on Human Rights had produced a report that demonstrated that social legitimacy through effective performance was a crucial factor in the success of a national human rights institution (NHRI).²⁰ It had identified the need to move from a complaints-led to a programme-led approach, which was endorsed by the Re-Evaluation Report and the accepted by the Government.

The distinctive feature of the new Human Rights Commission was a clearer statement of the functions of governance, management and compliance. This division of responsibility and activities ensures better use of resources, but also more effective delivery of the principal functions of education and advocacy, and compliance through the resolution of complaints. The objective of the new procedure for dispute resolution was to settle the matter as quickly as possible through the Commission, employing skilled mediators to deal with all complaints accepted by the Commission. If mediation was unsuccessful then the matter could be referred to the Director of Human Rights Proceedings, an independent office within the Commission.

The Director plays a critical role in the new Commission. It is the Director of Human Rights Proceedings who decides whether to represent a complaint, bring a complaint to the Human Rights Tribunal or refer the matter back to the Commission for mediation. This new role ensures the independence and professionalism of the complaints procedure. While the emphasis is on the settlement of complaints through mediators, some matters are not settled and it is appropriate that they are heard and determined by the Human Rights Tribunal established under the 2001 Amendment. Information on this procedure is clearly set out on the Commission's website and in their publications.

Whether the new procedures have been successful in providing an improved remedy may be assessed from the 2010 Annual Report that notes:

In the 12 months ending 30 June 2010, the Commission dealt with a record number of enquiries and complaints. ... In this period 8000 new human rights enquiries and complaints were recorded. Of these, 4647 requested the Commission to intervene and 1908 of the complaints featured an element of unlawful discrimination. There were 2795 requests for the Commission to engage in other ways than resolving a complaint.²¹

In terms of resolution of complaints of unlawful discrimination, the 2010 Annual Report notes:

In 2009–2010, the Commission's dispute resolution team closed 1756 complaints that raised issues of unlawful discrimination. Of these:

19 See *Te Mana i Waitangi: Human Rights & The Treaty of Waitangi* Draft Discussion Document, (Human Rights Commission, Wellington, July 2003).

20 *Performance & Legitimacy: National Human Rights Institutions* (International Council on Human Rights Policy, Versoix, Switzerland, 2000).

21 New Zealand Human Rights Commission "Annual Report" (2010) <www.hrc.co.nz>.

- 53 per cent were closed after further assessment, mediator discussion and/or exploration of issues with the complainant. After discussion with a mediator, many complainants go on to resolve the dispute themselves or to take other action more appropriate to their dispute.
- 22.5 per cent were resolved or partially resolved between the parties with mediator assistance.
- 21 per cent were discontinued by one or other party. This can be because of changes in the complainants' circumstances or their withdrawal of the complaint; parties not engaging in mediation; complainants choosing not to proceed further on receipt of an initial response from the respondent; or complainants deciding to take the matter to the Human Rights Review Tribunal.
- 3.5 per cent were found, on closer examination, to be outside discrimination jurisdiction.²²

I want to focus now on the legal remedies available to litigants as a result of the 2001 Amendment. I have already noted the complaints procedure under the Amendment Act that provides a remedy for individuals who seek redress for a breach of their human rights under the Act. In the mediation process, those remedies include damages, an apology and an undertaking not to continue the discriminatory behavior. If the matter is referred to the Tribunal the remedies available include a declaration, a restraining order, damages, and a direction to undertake training or a programme to ensure the discriminatory behavior does not continue. I have noted already that this process appears to be working reasonably well.

In a case where the Tribunal finds an enactment is in breach of the human rights provision, it may issue a declaration that the enactment is inconsistent with the right to freedom from discrimination affirmed by s 19 of the NZBORA. The Minister responsible for the offending enactment is then required to report to Parliament on the existence of the declaration and the government's response to it, within 21 days of all appeals being heard. Section 92K makes it clear that a declaration does not invalidate the enactment or discontinue the action or policy that is discriminatory. This latter remedy was the attempt to clarify the relationship between the Human Rights Act and the NZBORA. It was also an attempt to provide a remedy for a breach of the NZBORA through the Human Rights Tribunal that required the government to address the inconsistency. Just how effective a remedy may be seen through the case of *Atkinson v Ministry of Health*²³ where the Tribunal issued a declaration of inconsistency in respect of an allegation of discrimination on the grounds of family status by a group of families who are denied financial support for the care of relatives with disabilities. The Minister of Health announced the decision would be appealed and we await that decision.

The other situation where an enactment that is inconsistent with the NZBORA standard can be drawn to the attention of the government is under s 7 of the NZBORA. This provides that the Attorney General has a duty to bring to the attention of the House of Representatives any provisions of any Bill introduced that appear to be inconsistent with any rights and freedoms contained in the NZBORA. Although this provision does not prevent the government proceeding with legislation that is inconsistent with the NZBORA, it is intended to make the inconsistency transparent before enactment. An analysis of this provision and its operation is found in the text *The New Zealand Bill of Rights*.²⁴

22 Ibid.

23 *Atkinson v Ministry of Health* 8 HRNZ 902 [2010] NZHRT 1.

24 Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003).

There are several criticisms of the s 7 NZBORA process. First the provision only applies to Bills on introduction, yet under the mixed member proportional electoral system (MMP), Bills are likely to be considerably amended in the select committee, where the issue may be addressed or a new breach created that is not notified. Second, the subjects of the declarations are often only incidental to the policy of the enactment and therefore they are not seen as important and do not attract much debate in either the select committee or the House. Third, there is no obligation to follow the advice of the Attorney General. The independence of the Attorney General is constrained in terms of voting in support of a declaration because he or she is politically committed to vote with the government, although in the law officer role is not bound by collective responsibility.²⁵ Also, apart from the symbolism of voting independently, it would not change the outcome.

The role of the Attorney General is most effective when preventing provisions that are inconsistent with the Bill of Rights being introduced into legislation either by intervening during the policy stage or with colleagues in Cabinet. The 2001 Ministerial Review recommendations provided an opportunity for the Human Rights Commission to engage directly with public officials to make them aware of the provisions of both the NZBORA and Human Rights Act.²⁶ The Cabinet Manual now specifically requires that all Bills submitted to Cabinet must comply with both the NZBORA and the Human Rights Act.²⁷ Finally the seriousness with which the House takes a declaration of inconsistency depends on how seriously the members take such breaches. During the parliamentary debate on the 2001 Amendment itself the opposition political rhetoric characterised human rights with political correctness. The political environment for human rights advocacy in 2001 was not friendly. Rosslyn Noonan, the Chief Human Rights Commissioner recently described the challenge as follows:²⁸

If the only knowledge you had of the Human Rights Amendment Act 2001 had come from listening to Parliamentary debates during the second reading and Committee stages of the Bill, then you could well have believed that the new Human Rights Commission was going to be a frightening manifestation of Big Brother (or in this case Big Sister which was apparently infinitely worse), thought police, social engineering and political correctness, with a licence to establish re-education camps in the jungles (or in our case the bush). One Opposition MP suggested it should be called, among other things, the Human Rights Political Correctness Bill.

It is interesting to note that at the time of the debate in 2001 a nationwide opinion poll taken by UMR found that over 80 per cent of New Zealanders said it was extremely important (57 per cent) or important for the Human Rights Commission to deal with human rights issues.

An analysis of the effectiveness of NZBORA on the legislative process by Andrew Geddis concluded:²⁹

Finally, a large proportion of the apparently NZBORA inconsistent legislation that Parliament has enacted relates to groups possessing only marginal political influence: drug users; gang members; “boy racers”; prisoners on parole; paedophiles; etc. A government can expect to pay a minimal political cost by appearing to limit the rights of these groups.

25 *Cabinet Manual 2008* (Cabinet Office, Wellington, 2008) at 4.3, 4.4, 4.5.

26 *Non-Discrimination Standards for Government and the Public Sector: Guidelines on How to Apply the Standards and Who is Covered* (Ministry of Justice, Wellington, March 2002).

27 *Ibid.*, at 7.60, 7.61, 7.62.

28 Rosslyn Noonan “Background to the New Zealand Experience” (paper presented to the Everyday People, Everyday Rights Conference, Victorian Equal Opportunity and Human Rights Commission, Melbourne, Australia, 2009).

29 Andrew Geddis “The Comparative Irrelevance of the NZBORA to Legislative Practice” (2009) NZULR 465 at 488.

I concur with this assessment. The effectiveness of s 7 reports, however, has to be seen in the context of the number of enactments that do not attract such reports, which is often due to amendments to policy proposals prior to introduction of the legislation. Geddis reports that, since 1990, 48 s 7 reports have been issued by the Attorney-General, of which twenty-two related to government Bills and twenty-six to members or local Bills.³⁰ Bromwich, in an analysis of rights-vetting under the NZBORA, noted that between January 2003 and June 2009 the Attorney General tabled 17 s 7 declarations of inconsistency and of these, seven were not enacted; eight were enacted with the offending provision remaining; one enacted with amendment lessening the breach; and one enacted with the breach removed.³¹

As Attorney General I found the process of Bill of Rights vets resource intensive and the Bills that required a declaration were a small number. As a result of the 2001 Review I sought and gained support from the Cabinet to make all vets public on the Ministry of Justice website, which happened in 2003. While the declarations of inconsistency will rarely prevent legislation being enacted, they do ensure all legislation is formally scrutinised to ensure there is conformity with the NZBORA. They also legitimise the role of the Attorney General to protect and uphold human right standards in the executive decision making process. I was also conscious that the declarations were an opinion of how the NZBORA may be interpreted. On occasions I felt a good argument could be mounted against support of the declaration but in the interest of erring on the side of an interpretation that supported the Bill of Rights position, I agreed to the declaration of inconsistency.

The other procedure for declaring an enactment inconsistent with the NZBORA is for the courts, in their interpretation of an enactment, to make a declaration. Such a declaration does not invalidate the enactment in any way, as noted previously, but it does draw public attention to the offending provision. While there was no statutory recognition of this practice, it was widely supported by the NGO community and much of the legal profession.

Andrew Geddis, in the analysis mentioned previously, noted that the courts, in the context of interpreting the NZBORA, have adopted a considered cautious approach. Although in the *Moonen Case*³² the Court of Appeal, in a dicta statement by Justice Tipping, had asserted the obligation on the Court to draw attention to legislation that was inconsistent with the NZBORA, in the following terms:³³

That section was, however, retained and should be regarded as serving some useful purpose, both in the present statutory context and in its other potential applications. That purpose necessarily involves the court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject matter arises in that forum. In the light of the presence of s.5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the courts will indicate whether a particular legislative provision is or is not justified thereunder.

30 Ibid, at 475–475.

31 Tessa Bromwich “Parliamentary Rights-vetting under the NZBORA [2009] NZLJ 189.

32 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

33 Ibid, at 17.

This obligation, however, did not go as far as declaring an enactment unlawful. This was specifically prevented as part of the political accommodation to ensure the enactment of the NZBORA in 1990. The approach of the Supreme Court to legislation inconsistent with the NZBORA is seen in *R v Hansen*³⁴ where, although four of the five judges held that a provision relating to the burden of proof was an unreasonable limit on the right of the accused right to be presumed innocent, the court did not follow the approach of the House of Lords in *R v Lambert*³⁵ where a similar reverse onus issue arose. In this case, the House of Lords used a similar interpretative provision in the United Kingdom Human Rights Act 1998 to read down the provision and give a “rights friendly” interpretation. The New Zealand Supreme Court considered and rejected the United Kingdom judicial approach with Justice Tipping stating “whether [such an approach] is appropriate in England is not for me to say, but I am satisfied that it is not appropriate in New Zealand.”³⁶

The New Zealand Supreme Court approach has been described by Claudia Geiringer in these terms:³⁷

New Zealand judges, by contrast with some United Kingdom judges, have not understood section 6 of the Bill of Rights Act as inviting a new and distinctive approach to statutory interpretation. Rather, they have treated section 6 as a legislative manifestation of the established common law principle that legislation is, where possible, to be interpreted consistently with fundamental rights recognised by the common law. The *Hansen* decision is consistent with that general orientation.

The most recent judicial statement on the relationship between the courts and the Parliament in matters relating to the NZBORA arose in *Boscawen v Attorney-General*³⁸ where the Court of Appeal struck out an application to judicially review the Attorney-General’s decision not to issue a s 7 declaration of inconsistency report to the Electoral Finance Bill 2007. The Court decided on the grounds of comity between the legislative and judicial branches, and that reviewing the decision not to make a s 7 Report would:³⁹

... place the Court at the heart of a political debate actually being carried on in the House. It would effectively force a confrontation between the Attorney-General and the Courts, on a topic in which Parliament has entrusted the required assessment to the Attorney-General not to the Courts. ... A declaration that the Attorney-General should recommend that the Bill be reintroduced would be an even greater interference with the political and legislative processes of the House. In short, a review of the s 7 duty in this manner would be the antithesis of the comity principle.

This position of the New Zealand Court of Appeal accurately reflects the constitutional reality within which the relationship between the courts, the executive and the parliament work. It also reflects that the New Zealand Parliament and executive have worked hard to strengthen legislative responsibility for human rights and avoid conflict between the Parliament and the courts.⁴⁰

34 *R v Hansen* [2007] 3 NZLR 1.

35 *R v Lambert* [2002] 2AC 545 (HL).

36 *R v Hansen* [2007] 3 NZLR 1 at 56.

37 Claudia Geiringer “The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen* (2008) 6 NZJPI 59 at 73.

38 *Boscawen v Attorney-General* [2009] 2 NZLR 299 (CA).

39 *Ibid.*

40 There is a literature that argues there is a dialogue between the courts and parliament and that it best characterises the nature of the relationship. See P Hogg & A Bushell “The Charter Dialogue Between the Courts and Legislature” (1997) 35 Osgoode Hall LJ 75; Philip Joseph “Parliament, the Courts, and the Collaborative Enterprise” (2004) 15 KCLJ 321; Sara Jackson “Designing Human Rights Legislation: ‘Dialogue’, the Commonwealth Model and the Roles of Parliaments and Courts” (2007) Auckland U L Rev 89 at 115.

II. CONCLUSION

One of the most significant consequences of the 2001 Amendment then was to make all government action, except in immigration, subject to a human rights regime. It also provided the Bill of Rights, through s 19, with a statutory body mandated to advocate for human rights. It did not, however, give human rights primacy. The 2001 Amendment was an important step in embedding human rights as part of the New Zealand's domestic law. The Human Rights Commission now has the clearly stated role to advocate for human rights, while the Tribunal may now issue a declaration that an enactment is inconsistent with the right to be free from discrimination under s 19 of the NZBORA.

It is a truism that we only know how important human rights are when we need them most. We may be facing a challenge at the moment that will provide the real test of the importance and effectiveness of the reforms to human rights in the 2001 Amendment to the Human Rights Act. The economic recession and the presence of terrorist activity have seen the rights of individuals under attack from the state on the grounds of economic and security necessity. It is in these circumstances that the individual must rely on both political and legal action to protect human rights. The Chief Commissioner Rosslyn Noonan's comments in a recent speech are relevant in this context. She concluded in her assessment that much progress had been made on developing a human rights culture but that there is still much to be done, and warned:⁴¹

Since the beginning of the year it has been clear that the single greatest challenge to further strengthening human rights in New Zealand is the global economic and financial crisis. It is more important than ever that governments prioritise fundamental human rights as they face difficult decisions with fast reducing resources.

The 2001 Amendment was an attempt to provide more effective legal rights to protect an individual's human rights, while at the same time ensuring human rights were an integral part of good governance and were supported by the community. It did not, however, give legal primacy to human rights. This is a constitutional debate that waits its time to be held in New Zealand.

41 Ibid, at 12.